SRI SOFIAH MOO & ORS A

v.

SYED GAMAL SYED KECHIK AL-BUKHARY

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
AZAHAR MOHAMED HC
[CIVIL APPEAL NO: W-02-2338-2010]
21 APRIL 2011 C

SUCCESSION: *Letters of administration - Appointment of caveator - Appeal against appointment of caveator as joint administrator - Whether petitioners and caveator lawful next of kin of deceased and fell within meaning of s. 30 Probate and Administration Act 1959 - Whether there* D *were special circumstances to deny caveator's right to administer estate - Whether Judicial Commissioner had erred - Whether Judicial Commissioner had exercised discretion judicially - Rules of the High Court 1980, O. 71 r. 37(1)*

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The three appellants ('the three petitioners') brought this appeal against the decision of the High Court in allowing the appointment of the respondent ('the caveator') as joint administrator (in addition to the petitioners as the other administrators) of the estate of the late Tan Sri Syed Kechik Al-Bukhary ('the F deceased'). Briefly, the widow of the deceased (the first petitioner) and their two daughters (the second and third petitioners respectively) had filed a petition for letters of administration ('the petition') seeking to be appointed as the administrators of the deceased's estate. The deceased had a son ('the caveator') from a previously-dissolved marriage who had filed a caveat pursuant to G O. 71 r. 37(1) of the Rules of the High Court 1980 ('the caveat') to challenge the petition and sought an order, *inter alia*, that he be appointed as joint administrator of the estate as well. The judicial commissioner ordered for the caveator to be appointed as H joint administrator of the estate, and hence this appeal. The petitioners complained that the JC had erred in appointing the caveator as joint administrator in that the appointment had been forced upon the petitioners after the caveator had withdrawn his application to intervene in the High Court ('application to I intervene') with no liberty to file afresh. The caveator, however, submitted that having regard to the entry of the caveat by the

caveator, the JC had correctly exercised his discretion in appointing the caveator as joint administrator under s. 30 of the Probate and Administration Act 1959 read with s. 33 of the same Act.

Held (dismissing petitioners' appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) Order 72 r. 4(1) of the Rules of the High Court 1980 enables the caveator as a 'person not a party to a probate action' to 'apply to the court for leave to intervene in a probate action.' In the instant appeal, the petitioner's petition for letters of administration came within the meaning of a 'probate action' under O. 72 r. 1(2). That being the case, under O. 72 r. 4(1), the caveator may apply to the High Court for leave to intervene as a party in the probate action. The caveator who had filed his application to intervene was similarly entitled to withdraw it. (paras 14 & 15)

(2) Before the JC, there was the petition by the petitioners praying for an order that they be appointed as administrators and there was also the caveat in which the caveator sought his appointment as joint administrator. Under O. 71 r. 38(1), the JC 'may dispose of the matter in dispute in a summary manner or direct that the provisions of O. 72 shall apply.' The JC had directed the matter in dispute to be disposed summarily and had adjourned the petition into open court for hearing, which he could do under O. 71 r. 38(2). The JC had not erred in applying this procedure for disposing of the probate proceedings before him, and subsequently invoking s. 30. Under s. 30, all persons who are interested in the deceased's estate are eligible to be appointed as administrators or be granted administration of the estate. In the instant appeal, the petitioners were the widow and daughters of the deceased, while the caveator was the deceased's son. They were the lawful waris (next of kin) of the deceased and hence the beneficiaries. They clearly came within the meaning of the 'persons interested in the estate of the deceased' under s. 30. (paras 19 & 21)

(3) The alleged animosity or acrimony between the petitioners and the caveator could not be a good ground for the exclusion of the caveator as joint administrator, nor could that factor constitute special circumstances to deny the caveator's right to

administer the estate. The caveator, being the only son of the deceased and the biggest beneficiary in the estate of the deceased, according to Sijil Faraid, certainly had the right to administer it. The JC had exercised his discretion judicially and according to judicial principles. (paras 23 & 24)

Bahasa Malaysia *Translation Of Headnotes*

Ketiga-tiga perayu ('ketiga-tiga pempetisyen') membuat rayuan terhadap keputusan Mahkamah Tinggi dalam membenarkan perlantikan responden ('pengkaveat') sebagai pentadbir bersama (sebagai tambahan kepada perayu-perayu yang menjadi pentadbir-pentadbir yang lain) estet simati Tan Sri Syed Kechik Al-Bukhary ('simati'). Secara ringkas, balu simati (pempetisyen pertama) dan kedua-dua anak perempuan mereka (pempetisyen kedua dan ketiga) telah memfailkan petisyen untuk surat kuasa mentadbir ('petisyen') untuk dilantik sebagai pentadbir-pentadbir estet simati. Simati mempunyai seorang anak lelaki (pengkaveat) dari perkahwinan yang telah dibubarkan yang telah memfailkan kaveat di bawah A. 71 k. 37(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('kaveat') untuk membantah petisyen dan untuk, antara lain, perintah pengkaveat dilantik sebagai pentadbir bersama estet. Pesuruhjaya Kehakiman ('PK') memerintahkan supaya pengkaveat dilantik sebagai pentadbir bersama estet, oleh itu rayuan ini. Pempetisyen-pempetisyen berhujah bahawa PK telah salah dalam melantik pengkaveat sebagai pentadbir bersama kerana perlantikan itu telah dipaksa ke atas pempetisyen-pempetisyen selepas pengkaveat telah menarik balik permohonannya untuk mencelah di Mahkamah Tinggi ('permohonan mencelah') tanpa kebebasan untuk memfailkan semula. Pengkaveat, bagaimanapun, berhujah bahawa merujuk kepada kemasukan kaveat oleh pengkaveat, PK telah dengan betul melaksanakan budibicaranya dalam melantik pengkaveat sebagai pentadbir bersama di bawah s. 30 Akta Probet dan Pentadbiran 1959 ('Akta') dibaca dengan s. 33 Akta yang sama.

Diputuskan (menolak rayuan pempetisyen-pempetisyen)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan A. 72 k. 4(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ia membenarkan pengkaveat sebagai 'pihak yang tidak terlibat dalam tindakan probet' untuk 'memohon kebenaran mahkamah untuk mencelah dalam tindakan probet'. Di dalam rayuan ini, petisyen pempetisyen untuk surat kuasa mentadbir

termasuk dalam makna 'tindakan probet' di bawah A. 72 k. 1(2). Oleh itu, di bawah A. 72 k. 4(1), pengkaveat boleh memohon ke Mahkamah Tinggi untuk mencelah sebagai pihak di dalam tindakan probet. Pengkaveat yang telah memfailkan permohonannya untuk mencelah juga mempunyai hak untuk menarik balik.

(2) Di hadapan PK, terdapat petisyen oleh pempetisyen-pempetisyen yang memohon perintah mereka dilantik sebagai pentadbir-pentadbir dan juga terdapat kaveat di mana pengkaveat memohon perlantikannya sebagai pentadbir bersama. Di bawah A. 71 k. 38(1), PK 'boleh memutuskan perkara yang dipertikaikan dengan cara ringkas atau mengarahkan bahawa peruntukan-peruntukan A. 72 boleh digunapakai.' PK telah mengarahkan perkara yang dipertikaikan diputuskan secara ringkas dan melanjutkan petisyen ke mahkamah terbuka untuk perbicaraan, yang boleh dibuat di bawah A. 71 k. 38(2). PK tidak salah apabila menggunapakai prosedur tersebut dalam memutuskan prosiding-prosiding probet di hadapannya, dan kemudiannya menggunakan s. 30. Di bawah s. 30, semua pihak yang terlibat yang mempunyai kepentingan di dalam estet simati adalah layak dilantik sebagai pentadbir-pentadbir atau diberi kebenaran pentadbiran estet. Di dalam rayuan ini, pempetisyen-pempetisyen adalah balu dan anak-anak perempuan simati, yang pengkaveat adalah anak lelakinya. Mereka adalah waris-waris simati mengikut undang-undang dan adalah benefisiari-benefisiari. Mereka dengan jelas termasuk dalam makna 'pihak yang mempunyai kepentingan di dalam estet simati' di bawah s. 30 Akta.

(3) Kemarahan dan kepahitan yang didakwa wujud di antara pempetisyen-pempetisyen dan pengkaveat bukanlah alasan yang kukuh untuk mengecualikan pengkaveat sebagai pentadbir bersama, ataupun boleh jadi faktor yang mewujudkan hak keadaan khas untuk menafikan hak pengkaveat untuk mentadbir estet. Pengkaveat, sebagai anak lelaki tunggal simati dan benefisiari paling besar estet simati, menurut Sijil Faraid, mempunyai hak untuk mentadbirnya. PK telah melaksanakan budibicaranya secara kehakiman dan mengikut prinsip-prinsip kehakiman.

Case(s) referred to:

HSBC (Malaysia) Trustee Bhd v. Kong Kim Hoh & Ors [1999] 3 CLJ 763 HC ***(refd)***

Kam Soh Keh @ Kan Kok Pang v. Chan Kok Leong & Ors [1996] 1 BLJ 485 HC ***(refd)***

Re Estate of Ngau Ken Lock (Deceased) v. Ngau Voon Kiat [2002] 1 LNS 144 HC ***(refd)***

Yap Kee Par v. Molly Yap & Ors [1996] 1 CLJ 374 HC ***(refd)***

Legislation referred to:

Probate and Administration Act 1959, ss. 30, 33

Rules of the High Court 1980, O. 71 rr. 37(1), (8), (10), 38(1), (23). O. 72 rr. 1(2), 4(1)

For the appellant - Dato' Vijay Kumar Natarajan (Siti Salwa with him); M/s Kumar Jaspal Quah & Aishah

For the respondent - Pawancheek Merican (Suzilawati Ismail with him); M/s Wan Marican, Hamzah & Shaik

[Appeal from High Court, Kuala Lumpur; Petition For Grant Of Letters of Administration No: S31-668-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The three appellants ("the petitioners") brought this appeal against the decision of the Kuala Lumpur High Court in allowing the appointment of the respondent ("the caveator") as joint administrator (in addition to the petitioners as the other administrators) of the estate of the late Tan Sri Syed Kechik Al-Bukhary ("the deceased").

Factual Background

[2] The deceased died on 10 April 2009.

[3] On 23 September 2009, the deceased's widow Puan Sri Sofiah Moo @ Moo Nyok Yin (the 1st petitioner) and their two daughters, Sharifah Munira and Puan Sri Sharifah Zarah (the 2nd and 3rd petitioners respectively) filed a petition for letters of administration ("the petition") seeking to be appointed as the administrators of the deceased's estate.

[4] The deceased had a son, Syed Gamal ("the caveator") from a previously-dissolved marriage. In relation to the estate, he is the single biggest beneficiary in terms of proportion and percentage i.e 14/32 share (43.75%) according to the Sijil Faraid, while the petitioners jointly have the balance thereof ie, 18/32 share. However, in the petition, the petitioners did not include the caveator as joint administrator.

[5] On 14 April 2010, the caveator filed a caveat pursuant to O. 71 r. 37(1) of the Rules of the High Court 1980 ("the caveat") to challenge the petition and sought an order, *inter alia*, that he be appointed as joint administrator of the estate as well. (For brevity and convenience, a reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980).

[6] The notes of proceedings of the learned judicial commissioner ("the JC") recorded the following words:

> ... That parties agree that the Court would decide on just that sole question on who are to be administrators of the estate of the Deceased here, the Deceased being Tan Sri Syed Kechik @ Syed Bakar bin Syed Mohammad.

[7] The JC took the position that the sole question for determination by him was whether (in addition to the petitioners as the other administrators) the caveator should be appointed as joint administrator of the estate. The JC gave the answer in the affirmative and made an order to that effect.

[8] This is the dissatisfied petitioners' appeal against the JC's decision.

[9] We now give our grounds for dismissing the petitioners' appeal.

Appointment Of Caveator As Joint Administrator

[10] Petitioners' learned counsel Dato' Vijay Kumar Natarajan (assisted by Ms Siti Salwa) complained that the JC had erred in appointing the caveator as joint administrator in that the appointment has been forced upon the petitioners after the caveator had withdrawn his application to intervene in the High Court ("application to intervene") with no liberty to file afresh.

The petitioners added that there was animosity between the petitioners and the caveator. The petitioners also alleged that the caveator was a failed businessman.

[11] For the caveator, Mr Pawancheek Merican and Ms Suzilawati Ismail submitted that having regard to the entry of the caveat by the caveator, the JC had correctly exercised his discretion in appointing the caveator as joint administrator under s. 30 of the Probate and Administration Act 1959 read with s. 33 of the same Act. (A reference hereinafter to a section is a reference to that section in the Probate and Administration Act 1959).

[12] In view of the submissions presented for the respective parties herein and the JC's decision, the question which we have to answer in the instant appeal is:

> Upon a true construction of s. 30 read with s. 33, and given the above factual background, was the JC correct in appointing the caveator (in addition to the petitioners) as joint administrator of the estate of the deceased?

[13] Our search for an answer to the above question revolves around an analysis of the legal effect of:

(a) the caveator's withdrawal of his application to intervene;

(b) the caveator's entry of the caveat; and

(c) the High Court's exercise of the discretionary power under s. 30 read with s. 33.

Caveator's Withdrawal Of Application To Intervene

[14] Order 72 r. 4(1) enables the caveator as a "person not a party to a probate action" to "apply to the court for leave to intervene in a probate action." A probate action means, *inter alia*, an action for the grant of letters of administration of an estate of a deceased's person: O. 72 r. 1(2). In the instant appeal, the petitioner's petition for letters of administration comes within the meaning of a "probate action" under O. 72 r. 1(2). That being the case, under O. 72 r. 4(1), the caveator may apply to the High Court for leave to intervene as a party in the probate action which is the petitioners' petition.

A **[15]** The caveator who has filed his application to intervene is similarly entitled to withdraw it. Upon withdrawal, that application has been struck out. That would set the stage for us to consider and decide on the effect of the caveator's entry of the caveat.

B **Entry Of Caveat**

[16] The substantive law contained in s. 33 empowers an interested person such as the caveator to enter a caveat. The purpose of the caveat is to contest the petitioners' right to the grant of representation. The caveat also prevents the grant of representation relating to the estate of a deceased person without hearing the caveator. Section 33 reads:

> Any person having, or claiming to have, any interest may, at any time after the death of a deceased person and before representation has been granted to his estate, enter a general caveat in the prescribed form, so that no representation shall be granted without notice to the caveator; and after entry of any such caveat no representation shall be made until the caveator has been given an opportunity to contest the right of any petitioner to representation.

[17] Order 71 r. 37 provides for the procedure governing the entry of a caveat in a probate action. Under O. 71 r. 37(1), any person who wishes to ensure that no grant of representation is made without a notice to him may enter a caveat. The caveator did that on 14 April 2010, and sought, *inter alia*, his own appointment as joint administrator.

[18] At the instance of eg, the petitioners, a caveat may be warned by the issue from the registry of a warning in Form 174. The warning or a copy thereof must be served on, *inter alia*, the caveator: O. 71 r. 37(8). However, in the High Court, the petitioners did not file a warning under O. 71 r. 37(8), in which case, the caveator was not required to enter an appearance in Form 175 under O. 71 r. 37(10).

[19] Be that as it may, before the JC, there was the petition whereby the petitioners prayed for an order that they be appointed administrators. Meanwhile, there was also the caveat in which the caveator sought his appointment as joint administrator. These two processes inevitably involve a hotly contested matter, pertaining to the appointment of joint administrators. That being the case, the JC has to dispose of the matter in dispute. Under

O. 71 r. 38(1), the JC "may dispose of the matter in dispute in a summary manner or direct that the provisions of O. 72 shall apply." Apparently, the JC had directed the matter in dispute to be disposed of summarily. He had adjourned the petition into open court for hearing, which he could do under O. 71 r. 38(2). We are unable to see how the JC has erred in applying this procedure for disposing of the probate proceedings before him, and subsequently invoking s. 30.

Discretionary Powers Under s. 30

[20] The relevant portion of s. 30 reads:

> 30. Discretion of Court as to persons to whom administration is to be granted
>
> In granting administration the Court shall have regard to the rights of all persons interested in the estate of the deceased person and in the proceeds of sale thereof ...; and any such administration may be limited in any way the Court thinks fit:
>
> Provided that, where the deceased died wholly intestate as to his estate, administration shall, if application is made for the purpose, be granted to some one or more of the persons interested in the residuary estate of the deceased, unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person.

[21] Under s. 30, the general principle is that all persons who are interested in the deceased's estate are eligible to be appointed as administrators or be granted administration of the estate. The exceptions based on the insolvency of the estate or other special circumstances contained in the proviso to s. 30 are inapplicable to the facts of this case. In the instant appeal, the petitioners are the widow and the daughters of the deceased, while the caveator is the deceased's son. They are the lawful waris (next-of-kin) of the deceased and hence the beneficiaries. They clearly come within the meaning of the "persons interested in the estate of the deceased" person under s. 30. (See eg, *Kam Soh Keh @ Kan Kok Pang v. Chan Kok Leong & Ors* [1996] 1 BLJ 485 HC per James Foong J (now FCJ)).

[22] For the purposes of granting administration, s. 30 makes it mandatory for the court to have regard to the rights of all persons interested in the estate of the deceased person and in the

A proceeds of sale thereof. It enables the court to pass over the administration of the estate to a person entitled to a grant of representation. Any such administration may be limited in any way the court thinks fit. In particular, the court must consider the expeditious and economical administration of the deceased's estate:
B See *Yap Kee Par v. Molly Yap & Ors* [1996] 1 CLJ 374 HC at 224 G-H per Vincent Ng J (later JCA), as applied by Kamalanathan Rainam J (as he then was) in *HSBC (Malaysia) Trustee Bhd v. Kong Kim Hoh & Ors* [1999] 3 CLJ 763 HC; and by Ramly Ali J (now JCA) in *Re Estate of Ngau Ken Lock (Deceased)*
C *v. Ngau Voon Kiat* [2002] 1 LNS 144 HC.

[23] The alleged animosity or acrimony between the petitioners on the one hand and the caveator on the other cannot be a good ground for the exclusion of the caveator as joint administrator,
D nor can that factor constitute special circumstances to deny the caveator's right to administer the estate. The disputants herein, like all other litigants, have an alternative channel to resolve this impasse. They are at liberty to discuss and deliberate on matters pertaining to the administration of the estate through their own
E functionaries eg, their respective legal advisers. That could avert the alleged breach in their relationship, and transform the situation for their mutual benefit in sharing a well-deserved portion in the estate of the deceased who is after all their beloved one.

F **[24]** In relation to the petitioners' contention that the caveator had no knowledge in the business of the deceased and was a failed businessman, we are of the view that these reasons are merely feeble attempts advanced for the petitioners in order to marginalize the caveator in the administration of his late father's
G estate under s. 30. The caveator, being the only son of the deceased and the biggest beneficiary in the deceased's estate, certainly has the right to administer it, jointly with the petitioners. He cannot be ostracized willy nilly from the administration. We are unable to see how the caveator can be disqualified as joint
H administrator of his father's estate simply on the allegation that the caveator has allegedly no knowledge in the deceased's business or has failed in his own business. We are unable to sustain the negative perception which the petitioners had harboured against the caveator. While the caveator may be perceived as relatively
I less successful than the petitioners, such perception cannot *ipso*

facto take away the caveator's right to be considered for appointment as joint administrator of his father's estate. Success and failure in life, business or any other human activity is purely a matter of subjective judgment. Success is not final; failure is not fatal; it is the courage to continue that counts.

Conclusion

[25] The JC has exercised his discretion judicially and according to established judicial principles in appointing the caveator under s. 30. Our answer to the above question is in the affirmative.

[26] We found no merit in the petitioners' appeal and dismissed it with costs, which we fixed at RM40,000 after hearing submissions thereon. Deposit to be paid to the caveator on account of the fixed costs.